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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ARNOLD GREENSPAN,
Individually and as Trustee, etc.,

Plaintiff, Appellant and
Cross-Respondent,

v.

MANHATTAN LOFT, LLC, et al.,

Defendants, Respondents and
Cross-Appellants.

B205917

(Los Angeles County
Super. Ct. No. BS111465)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Richard L. Fruin, Judge. Reversed and remanded with directions.

Bingham McCutchen, Daniel Alberstone, Peter F. Smith and Rena L. Scott;
Greines, Martin, Stein & Richland, Robin Meadow and Jeffrey E. Raskin for Plaintiff,
Appellant and Cross-Respondent.

Leonard, Dicker & Schreiber, James P. Schreiber, Steven A. Schuman and
Christopher L. Frost for Defendants, Respondents and Cross-Appellants.

Andrew Meieran, or an entity he controlled, sold a building in downtown Los Angeles to Manhattan Loft, LLC. Under the purchase contract, certain rights were to flow to the Andrew Meieran Family Trust (the Trust). The purchase contract had an arbitration clause. A dispute arose and the Trust, through its trustee, Arnold Greenspan, instituted an arbitration proceeding against Manhattan Loft¹ as a third-party beneficiary under the purchase contract. The arbitrator entered an award in favor of the Trust in a total amount exceeding \$14 million. On cross-petitions to confirm and vacate the award, the trial court reduced the damages substantially, excising over \$12 million which had been awarded for lost profits and lost business value, on the basis that the arbitrator had exceeded his jurisdiction by awarding those damages to the Trust. As corrected, the arbitrator confirmed the award. Both parties appeal; the Trust argues that the trial court erred in reducing the arbitration award; Manhattan Loft argues that the trial court erred in refusing to vacate the award in its entirety. We conclude that the arbitrator did not exceed his jurisdiction, and therefore reverse with directions requiring the trial court to confirm the arbitrator's award.

¹ Manhattan Loft's principal, Barry Shy, was also named. We refer to Manhattan Loft and Shy collectively as "Manhattan Loft."

FACTUAL² AND PROCEDURAL BACKGROUND

1. Meieran's Initial Plans

Meieran was one of the owners of a century-old office building located at 215 W. 6th Street in Los Angeles (the building). Meieran's business plan involved the development of downtown bars in historic sites. He planned to remodel the building, and intended to operate a lounge or bar in the basement area. The building had been a bank; the basement contained the bank's vault. Meieran intended to preserve the historic features of the bank vault, including the polished steel vault doors, as part of the lounge. Additionally, the bank had a high open ceiling over the first-floor lobby reaching to the slab supporting the third floor. Meieran intended for this space to remain open, to provide smoke evacuation for the bar.

In broad terms, Meieran sold the building to Manhattan Loft, but retained the right to build a bar in the basement. The details of the transaction, however, involved two contracts, two addenda to those contracts, and several other entities. Ultimately, due to Manhattan Loft's improper destruction and modification of the bar space, it became impossible to open a bar in that space. This appeal surrounds an award of lost profits and lost business value to the Trust for its inability to ever open the bar. As the main issue on appeal is whether the arbitrator exceeded his jurisdiction by awarding lost

² As a court may not review the sufficiency of the evidence supporting an arbitrator's award (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 11), the facts we set forth are based on the arbitrator's award and, where necessary, the undisputed written documents governing the parties' relationship.

profits and lost business value damages to the Trust – on the basis that these damages would belong to some other entity – we consider the contracts in some detail.

2. The Lease and its Addendum

Chronologically, the first contract to occur was the lease for the bar space. Dated December 10, 2002, between Albion Pacific Properties as Lessor and Liquid Salvation, LLC as lessee, the lease was understood as transferring rights between one Meieran-controlled entity (which then owned the building), and another (which would operate the bar). An addendum to the lease was executed on March 14, 2003. Together, the lease and addendum provided that the leased space was to include the vault, the penthouse, and additional retail spaces on the first floor. The base rent was to be \$5000 per month for the lounge, with additional rent for the penthouse and retail spaces. The lessee was to have exclusive use of a freight elevator to run directly from the basement to the penthouse. The lessee was to have non-exclusive use “at all times of any stair or elevator within the Building, that are required for occupancy for its purpose as a bar, lounge and event space.” The rent obligation was to commence on October 1, 2005, or upon issuance of the certificate of occupancy, whichever occurred first.

Two further lease terms are significant. First, the lease itself defined “lessor” as “the owner or owners at the time in question of fee title to the Premises, or, if this is a sublease, of the Lessee’s interest in the prior lease.” Second, section 8.8 of the lease provided, in part, “Notwithstanding Lessor’s negligence or breach of this Lease, Lessor shall under no circumstances be liable for injury to Lessee’s business or for any loss of

income or profit therefrom.” Manhattan Loft would ultimately rely on this provision to argue that it could not be liable to the Trust for lost profits or lost business value.

On September 2, 2004, Liquid Salvation assigned the lease to Spirited Ventures 5. Deposition testimony from Meieran indicated that Spirited Ventures 5 is owned by Meieran, the Trust, and a third party, Marc Smith. Thus, at that point in time, the lessor was still Albion Pacific Properties, and the lessee was Spirited Ventures 5. Each entity was owned, at least in part, by Meieran.

3. *The Purchase Contract and Its Addendum*

Manhattan Loft, which is not a Meieran entity, entered the picture in May 2005. Manhattan Loft purchased the building itself from a Meieran entity,³ in order to convert the building into condominiums. The purchase was effected by means of a standard form purchase contract (dated May 2005) and a separately drafted addendum (in July 2005, shortly before the close of escrow). The seller was identified as Sixth and Spring, LLC. However, concurrent sale documents demonstrate that, on the day escrow closed, Sixth and Spring transferred the property to its three members, and they simultaneously transferred the property to the Trust, which transferred the property to Manhattan Loft. In other words, while the purchase contract identified Sixth and Spring as the seller, Manhattan Loft’s immediate transferor was the Trust. Under the purchase contract, Manhattan Loft bought the building for \$13 million. The contract provided

³ The seller was not Albion Pacific Properties. It is assumed that Albion Pacific Properties transferred the property to the seller at some point.

that Manhattan Loft would take possession of the building “subject to the rights of tenants under Existing Leases.”

Paragraph 2 of the addendum to the purchase contract provided that the “Lease and Addendum for the Lounge shall be modified” in several ways.⁴ Preliminarily, the addendum modified the space to be leased, eliminating the penthouse and adding additional retail space. The addendum then provided: “The [Trust] shall retain ownership of the entire lounge space, including [retail frontage]. Space is roughly delineated on [an attachment] including basement space now in possession of Lessee. The [Trust] shall take direct title of said space upon Buyer . . . and [the Trust] receiving the Final Sub-Division Report from the Department of Real Estate . . . or similar report that allows for the direct transfer of partial interest. The [Trust] and Buyer shall work diligently to receive said report. Until the report is received, the Lessee shall have all the benefits of the existing Bar Lease and Addendum (as modified herein) with the exception that any and every reference to rent or expiration in the Lease or Addendum is hereby deleted in their entirety wherever they may exist and in any context in which they are described as they relate to limiting the time under which the Lessee may have possession of said space or describe any amounts due for use of said space. Lessee shall

⁴ We note that while this purchase contract addendum was executed by Sixth and Spring and Meieran as seller, and Manhattan Loft and Barry Shy as buyer, it was not executed by anyone as lessee. The purchase agreement addendum states that the lease “shall” be modified, not that it “is hereby” modified, suggesting that the parties may have contemplated a future amendment to the lease, by the parties to the lease, effectuating these modifications. No such document exists, and none of the parties to this appeal suggest that the purchase agreement addendum did not itself modify the lease.

pay to Lessor the sum of \$1.00 per year until title is transferred as described herein regardless of when said transfer takes place. Said payment shall constitute all payment due for use or occupancy of said space, except that Lessee shall be responsible for its portion of the cost of its utilities delivered to its space until such time as Buyer provides individual meters, which shall be provided at the Buyer's sole cost and expense. Until the meters are installed, the Lessor shall provide a sub-meter and monthly readings to verify tenant[']s usage, and shall bill Lessee accordingly. After the [Trust] takes title of the space, the [Trust] shall be responsible for the unit['s] (or units['']) share of the Homeowner's Association fees, and shall no longer pay any other sum for the use or occupancy of said space. . . . The [Trust] shall still, after the transfer of the direct interest in the property, maintain all its rights and obligations in perpetuity as specified under the current Lease and Addendum as they refer to spaces outside the premises (use of elevator, signage, easements for egress, ADA access, after hours operation, and mechanical equipment etc.) and its rights with respect to use, occupancy, modification or improvements, and type of business to be maintained within the space at no additional cost whatsoever for any reason whatsoever."

As will be seen, the nature of the relationship formed by this paragraph is at the heart of the instant dispute. In this appeal, the Trust argues that, by the above paragraph, the Trust became substituted in for Spirited Ventures 5 as the lessee, and Manhattan Loft became its lessor. In contrast, Manhattan Loft argues that Spirited Ventures 5 remained the lessee, Manhattan Loft became the temporary lessor, and the Trust would become the lessor once the final subdivision report issued and Manhattan

Loft transferred title to the bar space to the Trust. The arbitrator concluded that, by this paragraph, the Trust sold the building to Manhattan Loft, “but secured a Lease and rights to ownership of the bar space, including easements for ingress/egress and other specifics set forth in the bar Lease and its Addendum.” The trial court determined that the existing bar lease was an asset owned by the Trust. Spirited Ventures 5 became the Trust’s lessee, and the Trust “was deemed a lessee of [Manhattan Loft] for the bar space (and the other areas it would own) but without any tenant obligation owed to [Manhattan Loft].” We do not attempt to interpret this contract; indeed, as we discuss below, we believe the trial court erred in attempting its own interpretation. We simply point out that the paragraph in question is rife with ambiguity, due, in part, to the parties’ use of the terms “lessor” and “lessee” without ever defining them.⁵ We also

⁵ The ambiguities begin in the first sentence. It states, “The [Trust] shall retain ownership” of the lounge space. It is not clear what is meant by retaining “ownership,” as fee title to the entire building was transferred to Manhattan Loft. Was this a retention of *equitable title* in the Trust (during the period in which the Trust could not have legal title) or did it create only a leasehold interest in the Trust? If it creates equitable title, how is this to be read with the lease itself, which states that the lessor is the party with *fee title*, or the prior lessee if the lease is a sublease? Did the Trust become Spirited Venture 5’s lessor during the brief moment it possessed fee title prior to transferring it to Manhattan Loft? Did the Trust, as the holder of equitable title, remain the lessor when it transferred fee title to Manhattan Loft? To whom is Spirited Ventures 5 to pay its \$1 per year in rent? Or is it the Trust which must pay? The paragraph later states that after the Trust takes fee title, it “shall no longer pay any other sum for the use or occupancy of said space,” but the “lessee” is the only entity required to pay *anything* for use or occupancy (rent of \$1 per year and the cost of utilities until a separate meter is installed); does this mean the Trust is the lessee? Similarly, the paragraph goes on to state that *after* the Trust is transferred fee title to the bar space, it shall “still . . . maintain all its rights and obligations in perpetuity as specified under the current Lease and Addendum as they refer to spaces outside the premises.” The use of “its” is ambiguous here – any rights the Trust has under the lease agreement prior to the transfer of title to Manhattan Loft are rights as the owner/lessor – it has the full rights to

point out that any ambiguity regarding the legal relationship among the parties relates only to the time period *prior to* the issuance of the final subdivision report. At that point, it is undisputed that fee title to the bar space would be transferred back to the Trust. Whether, at that point, Spirited Ventures 5 operated the bar pursuant to a lease from the Trust or the Trust operated the bar itself is a matter in which Manhattan Loft has no concern. It would simply own the *rest of the building* and have no legal interest in the bar space *at all*.

Other paragraphs of the purchase contract addendum with relevance to this dispute include a paragraph which may ameliorate the lease's prohibition on lost profit damages. It provides that the lease addendum is modified to state, "If any requirements [of the conversion of the building to a non-office use] interfere with Lessee's operations, Lessor shall mitigate any damage in income or long-term interference with the profitability and right to quiet enjoyment of the space by providing an amount of compensation to be determined by an independent Arbitrator."

Additionally, paragraph 20 of the purchase contract addendum is an arbitration clause, providing for binding arbitration of any controversy "that may arise in any[]way

use all of the property. But this sentence appears to be a reference to the lessee's lease rights to use spaces outside the bar space; does this mean that the Trust is the lessee? Or did the parties simply intend that the Trust retains the equitable rights to use the other areas of the building *to the same extent* as its lessee does under the lease? In speaking of utility meters, the paragraph talks of both the "Buyer" (who provides individual meters) and the "Lessor" (who provides a submeter and bills the lessee). Are "Buyer" and "Lessor" the same? A later paragraph of the addendum states that the costs of upgrades required as a result of modifying the building to a use other than office use shall be borne "by the Lessor/Buyer," which suggests that Manhattan Loft is, in fact, both.

in the interpretation or enforcement of any provision of this Addendum and Contract, the Lounge Lease, or any dispute related to the transaction described in any document regarding the business relationship or transaction between the Buyer and Seller, or [the Trust], that may arise after the close of escrow.” The arbitration clause provided for arbitration before a panel of three arbitrators under the commercial rules of the American Arbitration Association (AAA).

4. *Manhattan Loft Nearly Destroys the Bar Space*

After escrow closed, Manhattan Loft commenced the renovation of the building, while the Trust worked on the bar space. Shy, the principal of Manhattan Loft, holds a contractor’s license. His unlicensed nephew, Amit Tidhar, hired the workers and supervised the actual renovation of the building. Tidhar had full authority for the construction and did not regularly report progress. Tidhar did not consult with Meieran before doing work which might affect the bar space. “His concern was only with the work to be done for Shy; he was not concerned with Meieran’s needs or the bar premises.” He was not familiar with the Purchase documents; he made no effort to coordinate work with the bar. Shy did not instruct him to coordinate the projects. As a result, the bar premises and other areas in which the Trust “retain[ed] ownership” were severely damaged by Manhattan Loft’s work on the building.

As the Trust workers conducted their own renovation in the basement, they discovered problems caused by Manhattan Loft’s workers. They discovered “holes in the floors, debris floating in the air, and standing water on the basement floor. Basement work stopped on many occasions because of water sheeting down the walls.”

The steel vault doors were damaged by rust; mold growth was evident. “With no notice to Meieran or the Trust, [Manhattan] Loft workers filled in a concrete slab on the second floor so that the open area of the former bank lobby, surrounded by a mezzanine, had become a new floor for condominium construction.” This area had been designated for smoke evacuation from the bar; with the slab installed, there would be no way to provide smoke evacuation. Despite the parties’ agreement to cooperate regarding the placement of a shear wall for seismic improvement, Manhattan Loft changed the placement of the wall so that it entombed one vault door, completely blocked another, and left a third door unable to open more than two feet. Furthermore, the spraying of the wall material had not been controlled, and damaged furnishings stored in the vault. Manhattan Loft removed a stairway that was to be modified for bar access to the street; it was replaced with a fire-pump room. Although other stairs were built at another location, they provided no access to the bar. Elevators to which the bar was to have access were demolished by Manhattan Loft. Retail spaces on the first floor which also were part of the Trust’s premises were destroyed. At one point, Tidhar “was upset that Trust workers had turned the power on, so he turned off all electricity to the bar space, switched the breaker to off and had it covered up. When Meieran had a separate meter installed, Tidhar cut the extension cord.” When the arbitrator conducted a site visit to the building, he observed additional damage to the bar premises – “new electric wiring has been ripped out; sprinkler lines have been cut; a large pipe protrudes from the ceiling of the intended bar seating space; a breaker box had been bolted over to be inaccessible; toilets had been broken with a section of sewer pipe; at one point

a doorway connecting to the new corridor is covered over with drywall, and the floor elevation in the bar is approximately 24” to 30” higher than the corridor.” In short, Manhattan Loft caused substantial damage to the bar premises, and its creation of a second floor slab blocking smoke evacuation made it *impossible* that the bar premises could be used as a bar.⁶

5. *The Arbitration Demand*

On August 14, 2006, the Trust filed a demand for Arbitration with the AAA. In the space on the form for “Nature of the Dispute,” the Trust stated, “Breaches of a non-residential real estate agreement including failure to perform required improvements, failure to provide use of space as set forth in the agreement, destruction of property, and failure to pay reimbursements for loss of space involving real property located at [the building].” The Trust indicated the dollar amount of the claim was in excess of \$15,000. The demand for arbitration attached the purchase contract and its addendum, but not the lease or its addendum.

In December 2006, the Trust and Manhattan Loft stipulated to binding arbitration conducted by the Judicial Arbitration and Mediation Services (JAMS), before a single arbitrator, retired judge Keith Wisot. The parties also stipulated “unless otherwise agreed in writing by the parties, to the applicable JAMS Arbitration Rules and Procedures.”

⁶ At one point, Shy asked Meieran to falsely testify for him in pending litigation brought by a unit buyer in another building in which Shy and Meieran had a similar relationship. Meieran declined to do so, enraging Shy, who threatened, “No way in hell you’re going to build this bar” and “I’m going to make life hell for you.”

6. *Lost Profits at the Arbitration Hearing*

In the Trust's arbitration brief, it argued that, had it been able to open the bar as scheduled, it would have enjoyed profits of "at least \$1,700,000 by now." It sought those lost profits from Manhattan Loft. The arbitration hearing commenced on June 11, 2007. At that time, the Trust made an opening statement in which it sought, in addition to lost profits and loss of initial investment, *lost business value* in the amount of \$10,727,785. Manhattan Loft filed a motion to preclude evidence of lost business value on the basis that this claim had not been identified in discovery. At the same time, Manhattan Loft sought to respond to the Trust's opening statement by relying on paragraph 8.8 of the lease, which provides that the lessor "shall under no circumstances be liable for injury to Lessee's business or for any loss of income or profit therefrom." The arbitrator granted the Trust's motion to preclude this defense, on the basis that Manhattan Loft had not identified the defense in discovery. Manhattan Loft filed a written request for reconsideration of that ruling, on the basis that it could not have been required to identify the defense in discovery as the Trust had not claimed in the demand that it was seeking lost profits. The arbitrator denied reconsideration.

7. *The Extensions, Request for Preliminary Injunction, and Interim Award*

Under JAMS Rule 24(a), "[t]he arbitrator shall render a Final Award or a Partial Final Award within thirty (30) calendar days after the date of the close of the Hearing," with certain exceptions.⁷ The hearing continued until July 2, 2007, and the arbitrator

⁷ Manhattan Loft originally took the position that the JAMS rules did not apply. Instead, Manhattan Loft argued a provision in the arbitration clause requiring a final

accepted post-hearing briefs on July 30, 2007.⁸ The arbitrator therefore had until August 29, 2007 to issue his final award. JAMS Rule 24(a) provides that the arbitrator's time to issue the final award can be extended by agreement of the parties, by reopening the hearing, or "upon good cause for an extension of time to render the Award." On August 28, 2007, the arbitrator issued an order extending the time for rendering the final award to October 2, 2007, based on good cause because "[t]he volume of material to be considered, and the complexity of factual issues, makes preparation of this Award a complex undertaking that could not be achieved in the limited time available." While Manhattan Loft doubted the arbitrator's authority to issue such an extension, Manhattan Loft chose not to object to the extension. It concedes that the deadline was therefore extended to October 2, 2007.⁹

award within 30 days governed. Manhattan Loft does not pursue this argument on appeal. In any event, the chronology renders Manhattan Loft's position doubtful. Initially, the parties had agreed to AAA arbitration before a panel of three arbitrators, among other things. The parties *then* stipulated to JAMS arbitration before one arbitrator, pursuant to JAMS rules unless otherwise agreed to in writing. Given that the subsequent stipulation invalidated a great deal of the earlier agreement, it is difficult to construe the earlier agreement as creating a written exception to the terms of the stipulation. Indeed, JAMS Rule 2 provides that "[t]he Parties shall promptly notify JAMS of any such Party-agreed procedures and shall confirm such procedures in writing." There is no indication that JAMS was so notified.

⁸ The arbitrator shall declare the hearing closed when it determines that all relevant and material evidence and arguments have been presented. (JAMS Rule 22(h).) The arbitrator may defer the closing until a mutually agreed upon date in order to permit post-hearing briefs. (*Ibid.*)

⁹ In its cross-reply brief, Manhattan Loft argues the extension was invalid, apparently recanting its earlier concession. The concession was appropriate. Under JAMS Rule 27(a), "[i]f a Party becomes aware of a violation of or failure to comply

On September 7, 2007, the Trust wrote the arbitrator. The Trust claimed that Manhattan Loft was continuing to enter its space in the building, in ways which were further damaging the space. The Trust sought an injunction preventing Manhattan Loft from entering its space. Manhattan Loft responded with a letter to the arbitrator indicating that any request for injunctive relief was improper. Among other reasons, Manhattan Loft stated, “I understand that the underlying arbitration has already been taken under submission by you and that the parties are awaiting an award. I am not aware that the matter has been appropriately reopened.”

The arbitrator sought further evidence from the Trust establishing the purported continued entries into its space; the Trust provided such evidence. The arbitrator then issued an order setting a date for Manhattan Loft’s response, and a telephonic hearing on the injunction request for October 3, 2007. Manhattan Loft responded, arguing that it never entered the Trust’s space without permission and had no intention of doing so. It also argued that, since the final award was due on October 2, 2007, there was no point in having a hearing on a preliminary injunction on October 3, 2007.

On October 1, 2007, the arbitrator issued a second extension order. The order stated, “[t]he arbitrator has been diligently working to complete this Award, and has declined other business in order to do so. However, the volume of material submitted for review in this matter requires further time for completion of the Award.” The

with these Rules and fails promptly to object in writing, the objection will be deemed waived”

arbitrator therefore found good cause for an additional brief extension, to October 8, 2007.

On October 3, 2007, Manhattan Loft wrote the arbitrator requesting the arbitrator disqualify himself from any further action on the basis that, by failing to timely render an award, the arbitrator lost all jurisdiction. At this point in time, Manhattan Loft argued that both of the arbitrator's extension orders were invalid; Manhattan Loft challenged the arbitrator's claims of good cause, and also questioned the propriety of the arbitrator determining good cause unilaterally, without a hearing. Manhattan Loft indicated that it would attend the telephonic hearing on the injunction, but only to assert the arbitrator's lack of jurisdiction.

The telephonic hearing was held. The arbitrator declined to disqualify himself, and took the request for injunctive relief under submission. The arbitrator indicated that he would issue an interim award.

8. *The Interim Award and Final Award*

The following day, October 4, 2007, the arbitrator issued its interim award. The arbitrator noted that this was within the time provided for by the second extension.¹⁰ As to the merits, the arbitrator ruled in favor of the Trust, finding Meieran credible and Shy not. The arbitrator concluded the Trust could not recover the initial investment in the bar, because the bar space was not wholly unusable for any purpose. However, the arbitrator did conclude that the bar space could never be used as a bar, and awarded the

¹⁰ The award was served on the parties on October 8, 2007, also within the time provided by the second extension.

Trust damages for the lost business value of the bar. The Trust was awarded \$1,394,600 for property damage or loss, \$1,428,137 in lost profits, and \$10,727,785 in lost business value.¹¹ The Trust was also granted an injunction; the parties were to meet and confer on the language of the injunction, or to brief the issue if they could not agree. The arbitrator also set a briefing schedule for prevailing party attorney fees for the Trust. The last brief was to be filed on November 2, 2007, and the parties were to coordinate with the case manager to schedule a telephonic hearing on the remaining issues. The arbitrator specifically reserved jurisdiction to augment the award with attorney fees and costs, and to issue a more formal injunction.

On October 11, 2007, Manhattan Loft again wrote the arbitrator contesting his jurisdiction and indicating that it would not further participate on the merits. As a result, the Trust's request for \$870,326.75 in attorney fees and \$106,961.13 in costs

¹¹ The arbitrator stated: “[The Trust] further seeks further recovery of Meieran’s initial investment in the bar premises of \$468,000, plus the value of the square footage at \$5,400,000, in the event the bar is unusable for any purpose. However, the arbitrator does not find the bar space to be unusable for any purpose. Instead, the arbitrator finds the evidence has been clear and convincing that smoke evacuation necessary for a bar cannot be accommodated in the bar premises. However, the Trust *still has a leasehold property with easement rights to enforce. There was no testimony, and [the Trust] does not pursue, a property action against the landlord. By the terms of the Demand . . . this is strictly a landlord-tenant breach of contract dispute. It is not a joint venture or partnership in need of dissolution.* The arbitrator finds [the Trust] is entitled to contract damages for damage to property and for loss of profits and other economic business losses, but the parties will be relegated to their respective premises for whatever developments may further occur.” (Emphasis added.) The parties focus on the italicized language, and attempt to infer from it the arbitrator’s conclusion regarding the precise legal relationship between the Trust, Manhattan Loft, and Spirited Ventures 5 as a result of the addendum to the purchase agreement. We are not so convinced. This language appears to us to simply be an acknowledgement that this dispute is one that involves contract damages, not a reallocation of property rights.

went unopposed. On November 5, 2007, the arbitrator issued his final award which tracked the interim award in all material respects.¹² The final award added the award of \$977,287.88 in attorney fees and costs to the \$13,550,552 compensatory damages award.

9. *Cross-Petitions in the Trial Court*

Following the issuance of the final award, the Trust petitioned to confirm the award and Manhattan Loft petitioned to vacate it.¹³ The main issues raised by Manhattan Loft were that: (1) the arbitrator exceeded his jurisdiction by issuing an untimely award; and (2) the arbitrator exceeded his jurisdiction by awarding lost profits and lost business value for breach of the *lease*, even though the Trust had pursued it only on the purchase contract and was not a party to the lease. Manhattan Loft also argued that (3) the arbitrator erroneously and prejudicially failed to consider its defense based on paragraph 8.8 of the lease, which prohibited the recovery of lost profits.

¹² Prior to the issuance of the final award, the arbitrator sought the Trust's input on Manhattan Loft's claim that he had lost jurisdiction. The Trust had responded with a letter, explaining that the arbitrator had *reopened the hearing* in order to hear its request for injunctive relief, and the reopened hearing thus extended the arbitrator's time to issue a final award. The arbitrator adopted this theory, as well as relying on the two extensions he had issued, in the final award.

¹³ Manhattan Loft did not actually petition to vacate the award. As soon as Manhattan Loft had objected to the arbitrator's jurisdiction, the Trust commenced proceedings in the trial court to "compel" arbitration and to stay the action pending receipt of the arbitrator's award. In response, after the final award was issued, Manhattan Loft filed a cross petition to compel arbitration before a new arbitrator, on the basis that the arbitration award was a nullity. The Trust then petitioned to confirm the final award. The trial court considered the proceedings as involving cross-petitions to confirm and vacate the final award.

10. *The Trial Court's Ruling*

The trial court agreed with Manhattan Loft, in part. The trial court initially concluded that the arbitrator exceeded his powers. The trial court reviewed the relevant documents and concluded that, under the purchase contract addendum, the existing bar lease was an asset of the Trust. Under the lease, Spirited Ventures 5 was to operate the bar and pay rent to the Trust, although, until the condominium conversion was complete and title to the bar space could be transferred to the Trust, “the Trust was deemed a lessee of [Manhattan Loft] for the bar space (and the other areas it would own) but without any tenant obligation owed to [Manhattan Loft].”¹⁴ The trial court concluded that the Trust was never a tenant under the *lease*; it was only a temporary tenant under the purchase contract. As such, the Trust was never in the position where it would *operate the bar*; it would only *own* the bar space and collect rent from Spirited Ventures 5. In short, the trial court concluded that the contractual relationship between the parties was such that, if the bar could not be opened, the Trust would lose *rent* from Spirited Ventures 5, but it would be Spirited Ventures 5 that would lose profits and business value. As any claim for lost profits and lost business value belonged to Spirited Ventures 5 and that party was not before the arbitrator, the trial court concluded the arbitrator exceeded his jurisdiction by making any award for lost profits or lost

¹⁴ The trial court concluded that, where the addendum to the purchase contract stated that “[u]ntil the report is received, the Lessee shall have all the benefits of the existing Bar Lease and Addendum,” the “Lessee” is the Trust.

business value.¹⁵ The court declined to rule on Manhattan Loft's charge that the arbitrator had lost jurisdiction by failing to issue a timely award. The court concluded that such a ruling would be unnecessary at the time.

Given the trial court's conclusion that the award of lost profits and lost business value could not stand, the trial court scheduled a hearing on the issue of remedy. The court questioned if the entire award should be vacated or if the court should simply correct the award to excise the amounts awarded for lost profits and lost business value, leaving the awards for property damage, injunctive relief and attorney fees untouched. Ultimately, the trial court concluded correction of the award was proper. The award was corrected to excise \$12,155,922 for lost profits and business value;¹⁶ as corrected, the award was confirmed. Judgment was entered accordingly. The court indicated the trust would receive its attorney fees and costs, but deferred the award itself until the completion of appellate review.

The Trust filed a timely notice of appeal. Manhattan Loft filed a timely notice of cross-appeal.¹⁷

¹⁵ The trial court also concluded that the Trust "did not timely disclose its bar lost profit claim in the pre-litigation discovery and its late disclosure was prejudicial to [Manhattan Loft]." However, the court declined to "make any finding as to whether the arbitrator's rulings, under the circumstances, deprived [Manhattan Loft] of procedural due process in the conduct of the arbitration hearing. The parties have not adequately briefed this issue."

¹⁶ The trial court also slightly modified the language of the injunction.

¹⁷ Several proceedings on appeal followed. Manhattan Loft began violating the injunction with impunity, on the theory that if the Trust enforced the injunction, it would be accepting the benefits of the judgment and therefore waiving its right to

ISSUES ON APPEAL

While the history of this case is factually complex, the issues presented to us are simple. First, we consider whether the trial court erred in concluding the arbitrator exceeded his jurisdiction by entering an award for lost profits and lost business value; we conclude the trial court erred. Next, we consider whether the arbitrator erred in refusing to permit Manhattan Loft to raise as a defense paragraph 8.8 of the lease; we conclude he did not. Finally, we consider whether the arbitrator exceeded his jurisdiction by issuing an untimely award; we conclude that he did not. We therefore reverse the trial court's judgment and remand with directions that it enter a new judgment confirming the arbitrator's award in its entirety.

DISCUSSION

1. The Award of Lost Profits and Lost Business Value

The parties argue at length regarding the nature of the contractual relationship among the parties and non-parties; whether the Trust or Spirited Ventures 5 would be operating the bar; whether the initial demand sought lost profits and lost business value damages; and whether the Trust disclosed in pre-arbitration discovery that it was

appeal the judgment. This court then entered an injunction in the same language as that issued by the trial court, in order to preserve the status quo pending resolution on appeal. Manhattan Loft then alleged that the Trust violated the injunction by unreasonably withholding permission for it to enter the Trust's space to perform necessary work. We referred the matter to the trial court as special master, which held a hearing and issued findings of fact that the Trust was not in violation of the injunction. We adopted the trial court's findings as our own, and found the Trust not to be in violation.

seeking lost profits and lost business value damages. In our view, the necessary analysis is much simpler.

The analysis in this case begins and ends with *Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362 (*Advanced Micro*). In that case, our Supreme Court “decide[d] the standard by which courts are to determine whether a contractual arbitrator has exceeded his or her powers in awarding relief for a breach of contract.” (*Id.* at p. 366.) The court concluded that, “in the absence of more specific restrictions in the arbitration agreement, the submission or the rules of arbitration, the remedy an arbitrator fashions does not exceed his or her powers if it bears a rational relationship to the underlying contract as interpreted, expressly or impliedly, by the arbitrator and to the breach of contract found, expressly or impliedly, by the arbitrator.” (*Id.* at p. 367.)

“Fashioning remedies for a breach of contract or other injury is not always a simple matter of applying contractually specified relief to an easily measured injury. . . . It may require . . . finding a way of approximating the impact of a breach that cannot with any certainty be reduced to monetary terms. Passage of time and changed circumstances may have rendered any remedies suggested by the contract insufficient or excessive.” (*Advanced Micro, supra*, 9 Cal.4th at p. 374.) “The choice of remedy, then, may at times call on any decisionmaker’s flexibility, creativity and sense of fairness. In private arbitrations, the parties have bargained for the relatively free exercise of those faculties. Arbitrators, unless specifically restricted by the agreement to following legal rules ‘ “may base their decision upon broad principles of justice and equity” [Citations.] As early as 1852, this court recognized that, “The

arbitrators are not bound to award on principles of dry law, but may decide on principles of equity and good conscience, and make their award *ex aequo et bono* [according to what is just and good].” [Citation.]’ [Citation.] Were courts to reevaluate independently the merits of a particular remedy, the parties’ contractual expectation of a decision according to the arbitrators’ best judgment would be defeated.” (*Id.* at pp. 374-375.) Moreover, “[i]ndependent reevaluation by a court . . . is unlikely to be either expeditious or accurate.” (*Id.* at p. 375.)

An arbitrator’s exercise of discretion is not unlimited. Courts still “retain the ultimate authority to overturn awards as beyond the arbitrator’s powers, whether for an unauthorized remedy or decision on an unsubmitted issue.” (*Advanced Micro, supra*, 9 Cal.4th at p. 375.) But the standard of review is narrow and deferential. (*Id.* at p. 376.) Moreover, the review must accept the factual and legal determinations made by the arbitrator. (*Ibid.*)

In sum, the remedy awarded must bear “some rational relationship to the contract and the breach.” (*Advanced Micro, supra*, 9 Cal.4th at p. 381.) An award is rationally related to the breach “if it is aimed at compensating for, or alleviating the effects of, the breach.” (*Id.* at p. 381, fn. 12.) The required link “may be to the contractual terms as actually interpreted by the arbitrator . . . , to an interpretation implied in the award itself, or to a plausible theory of the contract’s general subject matter, framework or intent.” (*Id.* at p. 381.) While it is true that the arbitrator may not award a remedy expressly forbidden by the contract, there is no requirement that the remedy exactly correspond to the rights and obligations had the contract been performed. (*Id.* at pp. 381-382.) If the

parties wish the arbitrator's remedial authority to be restricted, they "would be well advised to set out such limitations explicitly and unambiguously in the arbitration clause."¹⁸ (*Id.* at p. 383.)

Thus, we simply must consider whether the award of lost profit and loss of business value damages to the Trust bore some rational relationship to the purchase contract (and its addendum) and Manhattan Loft's breach thereof. Clearly, it did. Under the addendum to the purchase agreement, regardless of the legal status of the parties while Manhattan Loft held fee title to the entire building, the parties intended for the Trust to eventually hold fee title to the bar space. The mutual intent of the parties, as expressed in the purchase agreement addendum, was that the parties would work together toward the goal that the Trust would build a bar in the vault, and Manhattan Loft would build condominiums in the upper floors of the building. The arbitrator found that Manhattan Loft breached its contract to such an extent that it would be impossible for the Trust to ever transform the vault space into a bar. The arbitrator awarded the Trust lost profits the bar would have earned, and the lost business value of the bar. Clearly, compensating the Trust for the lost profits and lost business value of the bar it could never open due to Manhattan Loft's breach of contract is rationally related to the breach.

¹⁸ Manhattan Loft does not suggest that a contractual term which required the arbitrators to make their award "in accordance with applicable law, the intention of the parties as expressed in this agreement and any amendments thereto, and upon the evidence produced at an arbitration hearing" was sufficient to limit the remedies the arbitrator could impose to those awardable in a court of law.

Manhattan Loft's argument against this conclusion relies on the lease.

Manhattan Loft points to the lease to argue that Spirited Ventures 5, not the Trust, would be entitled to any profits or business value the bar would generate; because of the lease, the Trust would lose only rent. Manhattan Loft also argues that the Trust never demanded arbitration based on the lease, and that the lessee would, in any event, be barred from recovering lost profits by paragraph 8.8 of the lease. In other words, Manhattan Loft points to a document on which the Trust *did not seek to recover*, and asserts that the document *assigned the relevant damages to another entity*, and simultaneously *precluded that entity from recovering such damages*. This, however, is a straw man argument; Manhattan Loft argues that the Trust should have sought lost profits and lost business value damages under the lease, but that it would have been precluded from recovering such damages had it so sought them.

The truth of the matter is not so convoluted. As between the Trust and Manhattan Loft, the Trust clearly stated a claim for destruction of the bar space. Lost profit and lost business value damages easily fall within the scope of damages which can be awarded for that breach, as the anticipated bar can never be built. While it may be that, under the lease, the Trust would be contractually obligated to pay the damages it collects from Manhattan Loft to Spirited Ventures 5, this is of no concern to Manhattan Loft.¹⁹ As between Manhattan Loft and the Trust, Manhattan Loft destroyed the Trust's ability to open and run a bar in the vault, and is liable for damages therefor. That the

¹⁹ In passing, Manhattan Loft suggests in its brief that the entire lease is invalid. If this is so, the Trust would clearly have the right to operate the bar, and Manhattan Loft's argument based on the lessee having this right would disappear.

Trust may have contracted that right away, in whole or in part, to another party does not absolve Manhattan Loft for liability for the wrong it committed against the Trust.²⁰

In this case, the trial court first interpreted the contract as a matter of law²¹ to determine which entity “owned” the right to recover lost profit and lost business value damages, and then determined whether that entity’s right to recover those damages had been pursued in the arbitration. But, under *Advanced Micro*, the trial court’s inquiry was limited to only whether the lost profit and lost business value damages awarded were rationally related to the contract on which the Trust pursued arbitration, and its breach. That another entity may have had the ultimate right to any lost profit and lost business value damages is irrelevant as long as the Trust had that right under the contract it pursued. The Trust did, and the trial court therefore erred in correcting the award to eliminate those damages.

2. *The Arbitrator Did Not Err in Precluding Manhattan Loft’s Defense Based on Paragraph 8.8 of the Lease.*

Similar concerns guide our resolution of Manhattan Loft’s claim that the award must be vacated because the arbitrator prejudicially erred in precluding its defense based on paragraph 8.8 of the lease, which provides, “Lessor shall under no circumstances be liable for injury to Lessee’s business or for any loss of income or

²⁰ Manhattan Loft does not argue that it is contractually liable to Spirited Ventures 5 for these damages, and that it risks double exposure for the same damages if the arbitration award is confirmed.

²¹ We believe the purchase agreement addendum is highly ambiguous, and could not be properly interpreted in the absence of extrinsic evidence, which was not before the trial court. In any event, we hold that the trial court erred by making the inquiry at all.

profit therefrom.”²² The arbitrator rejected this defense on the basis that it had not been disclosed by Manhattan Loft in pre-arbitration discovery. On appeal, the Trust argues that the arbitrator’s decision can be upheld on a different ground, that paragraph 8.8 of the lease had been superseded by the amended version of paragraph 15 of the lease addendum, which stated, “If any requirements [of the conversion] interfere with Lessee’s operations, Lessor shall mitigate any damage in income or long-term interference with the profitability and right to quiet enjoyment of the space by providing an amount of compensation to be determined by an independent Arbitrator”

The Trust’s argument appears, at least superficially, to be meritorious. However, we believe there is another basis on which Manhattan Loft’s contention may be resolved. Paragraph 8.8 of the lease relates to the lessor/lessee relationship; the arbitration demand was not based on the lease, but on the purchase contract. The award of lost profits and lost business value was not based on the Trust’s position as *lessee*, but on the Trust’s position as anticipated *future fee owner of the bar space*.²³ Manhattan Loft may have destroyed the bar space while the Trust was its lessee, but the damages at issue here are based on the profits that would have been earned once the

²² An arbitration award may be vacated when the rights of a party were substantially prejudiced by the arbitrator’s refusal to hear evidence material to the controversy. (Code Civ. Proc., § 1286.2, subd. (a)(5).)

²³ The arbitrator did refer to the relationship between the Trust and Manhattan Loft as one of lessor and lessee, as did the trial court. The contract in question, however, is too ambiguous to interpret as a matter of law; that said, the language which indicated the Trust was to “retain ownership” of the bar space suggests, to us, a conveyance of equitable title, not the creation of a lessor/lessee relationship. In any event, any lessor/lessee relationship – or transfer of equitable title – was agreed to be only temporary. The ultimate goal of the contract was a transfer of fee title to the Trust.

Trust owned the bar space and opened the bar. Thus, any limitation on damages as between the bar lessor and lessee is simply not relevant to the disposition of the arbitration.

3. *The Arbitrator's Award Was Not Untimely*

Manhattan Loft argues the arbitrator's award must be vacated as untimely, as the final award was not issued within 30 days of the close of the hearing, as required by the JAMS rules. We briefly review the relevant timeline. The hearing was closed when post-hearing briefs were submitted on July 30, 2007. The arbitrator had until August 29, 2007 to issue his award. On August 28, 2007, the arbitrator extended the time for his award to October 2, 2007; neither party objected. On October 1, 2007, the arbitrator issued a second extension, to October 8, 2007. At this point, on October 3, 2007, Manhattan Loft objected. On that same date, a telephonic hearing was held on the Trust's motion for a preliminary injunction; Manhattan Loft did not participate, except to pursue its objection to the arbitrator's jurisdiction. On the very next day, October 4, 2007, the arbitrator issued his interim award. The interim award resolved all outstanding matters. It included a ruling on the injunction, and reserved jurisdiction to issue a more formal injunction, and to award attorney fees and costs in favor of the Trust. A briefing schedule was set on these latter issues, with final briefs to be filed on November 2, 2007. The arbitrator's final award issued on November 5, 2007.

In the absence of any objection to the arbitrator's first extension, the extension to October 2, 2007 was valid. (JAMS Rule 27(a).) Manhattan Loft argues, however, that the failure to issue a final award by that date deprived the arbitrator of jurisdiction, as it

objected in writing on October 3, 2007, to any further extensions. (See Code Civ. Proc., § 1283.8 [providing that a party to an arbitration waives an objection that an award is untimely unless the party objects in writing prior to the service of the award].) We disagree.

Prior to Manhattan Loft's objection, the arbitrator had issued a second extension to October 8, 2007. Under JAMS Rule 24(a), the arbitrator may issue an extension *either* by agreement of the parties *or* with good cause. The arbitrator found good cause for an extension, and rejected Manhattan Loft's argument that good cause could not be established in the absence of notice and a hearing. While Manhattan Loft argues that the arbitrator should not be permitted to unilaterally extend the time for the issuance of an award, JAMS Rule 24(a) appears to permit just that. JAMS Rule 11(a) provides that, "[o]nce appointed, the Arbitrator shall resolve disputes about the interpretation and applicability of these Rules and conduct of the Arbitration Hearing. The resolution of the issue by the Arbitrator shall be final." Thus, the arbitrator concluded that he had the power to issue the second extension without notice and a hearing, and we cannot question this conclusion. Had the parties wished to deprive the arbitrator of his authority to extend the date of the award, the parties were free to stipulate that JAMS Rule 24(a) did not apply; they did not. Additionally, under Code of Civil Procedure section 1283.8, Manhattan Loft could have petitioned the trial court to order the arbitration award to be issued by a date certain (*Bosworth v. Whitmore* (2006) 135 Cal.App.4th 536, 539); it did not seek or obtain such an order. In short, the arbitrator's second extension was valid, and the arbitrator therefore had until October 8,

2007 to issue his final award. The interim award, issued on October 4, 2007, was well within this time.²⁴ Manhattan Loft next contends that the final award, issued on November 5, is invalid because it was not timely.

The interim award, however, indicated there would be further briefing on the issue of attorney fees and costs, with the final briefs to be due on November 2, 2007. The final award was issued three days after the final briefing. Irrespective of whether (1) the arbitrator's request for further briefing on fees and costs was, in effect, an order reopening the hearing to resolve that issue (JAMS Rule 22(i)); (2) the subsequent final order was a timely²⁵ correction of the award (*Britz, Inc. v. Alfa-Laval Food & Dairy Co.*

²⁴ Manhattan Loft makes much of the fact that the award of October 4, 2007 was denominated "interim award" rather than "partial final award." To consider the award an "interim award" rather than a "partial final award" would be an improper elevation of form over substance. JAMS Rule 24(e) provides for interim awards, stating, "The Arbitrator may take whatever interim measures are deemed necessary, including injunctive relief and measures for the protection or conservation of property and disposition of disposable goods. Such interim measures may take the form of an interim Award, and the Arbitrator may require security for the costs of such measures." It is clear that the October 4, 2007 award was not an "interim award" under this definition. The award resolved all outstanding issues, with the exception of costs, attorney fees, and the final language of the injunction. The award did not preserve the status quo pending litigation, or dispose of disposable goods; instead, it awarded the Trust over \$13 million in damages and expressly stated that, with the exception of the issues on which the arbitrator reserved jurisdiction, it "dispose[d] of all factual issues raised in th[e] arbitration." It was therefore a partial final award. Manhattan Loft next argues that, although it has briefed this argument on appeal, the argument is waived by the Trust's failure to raise it before the trial court. We disagree. It is Manhattan Loft's burden on appeal to establish that the award was untimely as a matter of law; the substance of the award itself indicates that it was a timely partial final award.

²⁵ An arbitrator may correct its award within 30 days of service of the award. (Code Civ. Proc., § 1284.) While the interim award was filed on October 4, 2007, it was not issued by JAMS until October 8, 2007. Thus, the correction on November 5, 2007 was timely.

(1995) 34 Cal.App.4th 1085, 1105-1106); or (3) the subsequent final order was a timely amendment of the award (*Evans v. Centerstone Development Co.* (2005) 134 Cal.App.4th 151, 160), the result is the same. There was no loss of jurisdiction to issue the final award.

DISPOSITION

The judgment of the trial court is reversed and the matter remanded with directions that the trial court vacate its order correcting the arbitrator's award and enter a new and different order confirming the award in its entirety. The Trust shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

KITCHING, J.